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IN THE

# Supreme Court of the United States

October Term, 1958

No. 564 Misc.

JOHN FRANCIS NOTO,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Cases

## Constitution, Statutes, Etc.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, John Francis Noto, petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Western District of New York convicting him after a jury trial and sentencing him to imprisonment for five years on a one count indictment charging violation of the so-called membership clause of the Smith Act, 54 Stat. 671, 18 U. S. C. 2385.

### Opinion Below

The opinion of the court below (App. A, *infra*) has not yet been reported.

### Jurisdiction

The judgment of the court below is dated and was entered on December 31, 1958. Jurisdiction of this Court is conferred by 28 U. S. C. 1254.

## Questions Presented

1. Whether the court below erred in holding that the incitement-to-action test of advocacy enunciated in *Yates* v. *United States*, 354 U. S. 298, is inapplicable to a prosecution under the membership clause of the Smith Act.

2. Whether the evidence was sufficient to sustain the conviction.

3. Whether the conviction was based on evidence which should have been excluded as incompetent, irrelevant, remote and prejudicial.

4. Whether the immunity conferred by section 4(f) of the Internal Security Act (50 U. S. C. 783(f)) bars prosecution of the offense charged in the indictment.

5. Whether the membership clause of the Smith Act is unconstitutional on its face or as applied in this case.

## Statutes Involved

The Smith Act and section 4(f) of the Internal Security Act are set out in Appendix B, *infra*.

## Statement of the Case

All of the questions presented here with the exception of question 1 are likewise presented in *Scales* v. *United States*, No. 488 this Term, certiorari granted, December 15, 1958.[1] With the same exception, these questions were also presented in *Scales* v. *United States*, 355 U. S. 1, and *Lightfoot* v. *United States*, 355 U. S. 2, in which, after hearing argument, the Court reversed the convictions in consequence of the Solicitor General's confessions of error under *Jencks* v. *United States*, 353 U. S. 657.

[1] Scales raises additional questions not presented here. The Solicitor General consented to certiorari in that case except as to a question relating to the constitutionality of the *Jencks* statute, 18 U. S. C. 3500.

**The indictment.**

The indictment, returned November 8, 1954, charges (1) that since January, 1946, the Communist Party has been a group that teaches and advocates the violent overthrow of the government as speedily as circumstances would permit, and (2) that during the same period, the defendant has been a member of the Communist Party, well knowing that it advocates the foregoing doctrine and himself "intending to bring about such overthrow by force and violence as speedily as circumstances would permit." [2]

**The evidence.**

It was not disputed that petitioner was a member of the Communist Party and held various full-time positions in its New York organization during the period of the indictment.

The prosecution called ten witnesses. Lautner, its principal witness and a familiar figure in Smith Act trials, has been in the employ of the Department of Justice since his expulsion from the Communist Party in 1950. As in the *Yates* case, *supra*, Lautner recounted his career in the Party from 1929 to 1950, testified about numerous conversations, meetings and conventions in which he had participated and summarized what he had been taught and had himself taught in Party schools (R. 4-386),[3] With the exception noted later, none of his testimony was connected with petitioner.

Also as in *Yates*, Lautner served as the vehicle for the introduction in evidence of a mass of Communist books and articles, many of which were likewise never connected with petitioner. Based on his knowledge of this literature and his Party experience, Lautner stated it to be his opinion

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[2] The indictment will be found at p. 2 of the appendix to appellant's brief in the court below.

[3] "R." designates the typewritten transcript of the trial proceedings.

that the "ultimate aim" of the Party is to destroy capitalism and establish socialism and that this objective "will be achieved by force, challenge and violence" (R. 383-85). This and his other testimony concerning Communist Party teaching and the literature introduced through him established, at most, that the Party advocated political violence as a matter of abstract doctrine. Cf. *Yates*, at 529.

Lautner's only significant contacts with petitioner occurred in 1949 when the former was engaged in setting up a so-called "underground" Party organization in New York. The witness testified that one of the purposes of this organization was to enable the Party to work for the restoration of its legal status in the event that it was outlawed as a result of Smith Act and other prosecutions and to provide printing and mimeographing equipment for use if commercial facilities became unavailable to it (R. 523-26). In connection with this work, Lautner had several conversations with petitioner about setting up an underground organization in the Buffalo area and arranged to supply him with a photo-offset press and mimeograph machines (R. 332-43).

The witness Dietch, a former Communist, testified that in 1951 petitioner sought his help in the purchase of two small printing presses for use in the event that the Party was forced underground (R. 629-33). Another witness, Greenberg, also a former Communist, testified that in 1951 he stored some printing equipment in his house at Noto's request (R. 1015-19).

Three witnesses, Chatley, Regan and Hicks, all of whom had joined the Communist Party to spy on it at the request of the FBI (R. 681, 754, 853), testified to conversations with and speeches by petitioner between 1943 and 1951. If believed, their testimony establishes that Noto urged building the Communist Party among workers in the automobile, steel and electrical industries in the Buffalo area and was concerned with the security of the organization in the face

of Smith Act prosecutions and proceedings under the Internal Security Act. They pictured him as a disciplined and devoted Communist who believed in and predicted the victory of socialism in this country. (R. 692-717; 765-79; 868-99.) But their testimony is devoid of any statement by petitioner, or by anyone in his presence, advocating violent action, present or future, for the overthrow of the government.[4]

Regan testified that in 1951 petitioner grew a mustache and stated that he "was going under a disguise to conceal himself." When Regan saw petitioner for the last time a month later, he said that he had been doing a great deal of travelling and "had to be on the move" (R. 930-31).

The only testimony about petitioner subsequent to 1951 was given by the four remaining prosecution witnesses. They identified him as a man they had known in 1953-55 as Louis Paresi who had lived with his wife and daughter in New Jersey where he had been employed by the Goodyear Rubber Company (R. 988-91; 1037-40; 1042-43; 1060-62).

The witnesses for petitioner were a librarian who testified that many of the Communist books introduced in evidence were available at the public library (R. 1090-99) and an FBI agent who described the circumstances of petitioner's arrest in Buffalo (R. 1107).

**The opinion below.**

The trial court instructed the jury in substance that it could not convict unless it found that the advocacy of the Communist Party was reasonably calculated to incite persons to action for the violent overthrow of the government as soon as circumstances would permit (R. 1258). The government's brief below (pp. 2-3) acknowledged that the conviction was invalid unless the evidence of the advocacy of the Communist Party satisfied the incitement-to-action

[4] This also appears from the summary of the evidence in the opinion below (App. A, *infra*, pp. 17-19).

test of *Yates*. Nevertheless, the court below ruled that the *Yates* test is wholly inapplicable to a prosecution under the membership clause of the Smith Act (App. A, *infra*, pp. 24-26). Accordingly, it held that the evidence was sufficient to sustain the conviction. It also rejected petitioner's contentions that the membership clause is unconstitutional on its face and as applied and that section 4(f) of the Internal Security Act bars prosecution of the offense charged (App. A, *infra*, pp. 20-24).

## Reasons for Granting the Writ

### 1. The misconstruction of the statute by the court below.

The court below held that the incitement-to-action test enunciated by *Yates, supra*, in reversing convictions for conspiracy to violate the advocacy provision of the Smith Act is inapplicable to prosecutions under the membership clause (App. A, *infra*, p. 24).[5] By reading incitement out of the membership clause, the court dispensed with the necessity of proof (a) that the advocacy of the Communist Party took the form of inciting *action* for violent overthrow and (b) that the petitioner knew the advocacy of the organization to be of this character.

The court's construction of the statute is plainly erroneous. It appears to be based on the view that since the defendant in a membership case is not charged with *personal* advocacy of violent overthrow, the *Yates* test is wholly inapplicable. The court disregards the fact that the gravamen of the offense is membership in an *organization* which advocates violent overthrow. There is nothing in the statute or the legislative history which can possibly give one connotation to the advocacy of political violence when engaged in by an individual and quite another to advocacy of the same doctrine by a group. On the contrary,

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[5] The trial court gave an appropriate instruction on the issue of incitement (R. 1258).

*Dennis* v. *United States*, 341 U. S. 494, 502, 512, applied the incitement-to-action test to the offense of organizing a group which advocates violent overthrow. And see *Nowak* v. *United States*, 356 U. S. 660, 665, 667.

The construction of the membership clause below is not only contrary to *Dennis*, *Yates* and *Nowak* but raises the grave constitutional questions which *Yates* (at 319) found it unnecessary to reach. So construed, the statute authorizes a conviction for knowing membership in an organization which does no more than advocate *belief* in revolutionary violence as an abstract political doctrine. But membership in such an organization (whatever the knowledge and intent of the member) cannot create a clear and present danger and is protected by the First Amendment and due process.

**2. The insufficiency of the evidence.**

Had the court below properly construed the statute, a judgment of acquittal would have been required by its own decisions in *United States* v. *Silverman*, 248 F. 2d 271 and *United States* v. *Jackson*, 257 F. 2d 830, as well as by *Yates*, *supra*. Proof of the character of the advocacy of the Communist Party was substantially the same in all four cases, resting as it did on the same books and on the testimony of the same witness, Lautner. And the evidence as to the industrial concentration policy of the Party and its "underground" activities, on which the court below heavily relied, was rejected as proof of action-inciting advocacy in *Silverman*, *Jackson* and *Yates*.

Furthermore, as is apparent from the summary of the evidence in the opinion below (App. A, *infra*, pp. 17-19) there was no showing that petitioner had ever personally incited others to violent overthrow. The facts that he was an officer of the Party, was active in its affairs and had predicted the eventual overthrow of capitalism in this country are wholly insufficient to establish guilty knowledge. *Nowak* v. *United States*, *supra*, at 666-68.

**3. The erroneous admission of evidence.**

Lautner's testimony concerning the teaching and advocacy of the Communist Party covered a span of twenty years. All of it related to incidents prior to 1950, outside of the period of the statute of limitations. Many of the incidents he recounted occurred prior to January, 1946, the beginning of the indictment period, and others ante-dated enactment of the Smith Act in 1940. Furthermore, with the few exceptions noted above, petitioner was not present at any of the conversations, classes, conventions and meetings which Lautner described, nor were they connected with petitioner in any other way.

Much of this testimony was highly prejudicial. To cite but two examples, Lautner was permitted to testify that he attended a Party school in 1930 where he was taught that a peaceful transition to socialism was impossible in this country (R. 51-53), and that he was present at a meeting in 1934 where instructions were given to infiltrate the National Guard (R. 27). Furthermore, inflammatory passages were read to the jury from books and articles which Lautner said he had used in Party classes although there was no evidence that petitioner had ever seen, much less read them (see e. g., R. 54, 92-93). Finally, Lautner was permitted to state his opinion that the ultimate aim of the Communist Party is violent overthrow (R. 383-85).

All of this evidence was admitted on the theory that the prosecution was entitled to prove the nature of the Party's advocacy by facts outside of petitioner's knowledge. But the central issue in the case was whether, to the knowledge of petitioner, the Party advocated proscribed doctrine. Statements and opinions of third parties which were never communicated to petitioner are wholly irrelevant to that issue. Moreover, they are incompetent as hearsay. Finally, insofar at least as this evidence antedated the Smith Act, it should have been excluded for remoteness. *Wolf* v. *United States*, 259 F. 388; *Haywood* v. *United States*, 268 F. 795; *Langer* v. *United States*, 76

F. 2d 817; *Kammann* v. *United States*, 259 F. 192. Cf. *United States* v. *Dennis*, 183 F. 2d 201, to the contrary.

The evidentiary questions presented here, like the similar questions presented in *Scales*, merit review by this Court.

**4. Section 4(f) of the Internal Security Act as a bar to prosecution of the offense charged.**

Section 4(f) of the Internal Security Act (50 U. S. C. 783(f)) provides that neither membership nor officership in a Communist organization "shall constitute per se a violation of subsection (a) or subsection (c) of this section *or of any other criminal statute*" (emphasis supplied). The court below held that this section does not bar prosecution of a Communist Party member under the membership clause of the Smith Act because membership, when accompanied by guilty knowledge and intent, is something more than "membership per se" for which immunity is given.

This restrictive construction of section 4(f) makes the reference to "any other criminal statute" meaningless. For the only other criminal statute which might have been applicable to members of the Communist Party by virtue of their membership was the membership clause of the Smith Act. And that statute makes guilty knowledge an element of the offense. Hence, Congress must have intended membership "per se" to embrace membership with guilty knowledge, but to exclude membership which is accompanied by some other *overt act*. The legislative history confirms this reading of 4(f) and demonstrates that Congress intended it to bar the prosecution of Communists under the membership clause. See Sen. Rep. No. 2369, Part 2, 81st Cong., 2d Sess., pp. 12-13; 96 C. R. 14479, 15198, 13739, 13761.

In its grant of certiorari in *Scales*, *supra*, the Court agreed to review the question here presented. Similar action should therefore be taken in the present case.

**5. The constitutionality of the membership clause on its face and as applied.**

Unlike the advocacy and organizing provisions of the Smith Act, the membership clause does not punish an individual for his own advocacy or activity but for the advocacy of others in the group of which he is a member. It is not advocacy but association which the clause makes criminal. The crime involves no overt act beyond that of becoming and remaining a member of the group. As written, the membership clause authorizes the conviction of an accused notwithstanding that his membership is for an innocent purpose and is wholly inactive.

A statute creating a crime of this character is plainly incompatible with the First Amendment and due process. Indeed, the government has conceded as much and urges only that the courts rewrite the statute by including criminal intent and what it calls "the activity factor" as additional elements of the offense.[6] Moreover, as we have seen, the construction of the statute below adds a further element of unconstitutionality by authorizing a conviction for knowing membership in an organization which merely advocates *belief* in violent overthrow and not *action* to bring it about.

The Court has undertaken to review the constitutionality of the membership clause in *Scales*. The same action should follow here.

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[6] Intent to bring about violent overthrow is charged in the indictment. The addition of "the activity factor" was proposed in the Solicitor General's Supplemental Memorandum on Reargument in *Scales* and *Lightfoot, supra*, October Term, 1957. This factor was not charged in the indictment or covered by the trial court's instructions.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Attorney for Petitioner.*

# APPENDIX A

## Opinion Below

Before:

HINCKS and WATERMAN, *Circuit Judges*,
and RYAN, *District Judge*.

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Appeal from a judgment of conviction rendered in the United States District Court for the Western District of New York after a trial with a jury before Judge Burke. *Affirmed.*

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CHARLES J. McDONOUGH, Buffalo, New York, *Attorney for appellant.*

JOHN O. HENDERSON, United States Attorney for the Western District of New York, Buffalo, N. Y. (Lawrence P. McGauley, John C. Keeney, and John J. Keating, Attorneys Department of Justice, on the brief), *for appellee.*

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RYAN, *District Judge*:

This is an appeal from a judgment of conviction and sentence for violation of the membership provision of the Smith Act, 18 U. S. C. § 2385.* The indictment charged:

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* The statute provides:

"Whoever organizes or helps or attempts to organize any society, group or assembly of persons who teach, advocate or encourage the overthrow of any such government by force and violence; or becomes or is a member of, or affiliates with any such society, group or assembly of persons, knowing the purpose thereof—Shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *"

1. That from January 1946 up to November 1954 (the date of the filing of the indictment), the Communist Party has at all times been a group of persons who teach and advocate the forcible overthrow of the Government of the United States as speedily as circumstances would permit;

2. That continuously from January 1946, the defendant has been a member of the Communist Party well knowing that it was a group that taught and advocated the forcible overthrow of the Government as speedily as circumstances would permit, and that defendant intended to bring about such overthrow by force and violence as speedily as circumstances would permit.

The appeal raises questions as to the sufficiency of the evidence, the constitutionality of the statute and the validity of the indictment in view of Section 4(f) of the Internal Security Act 1950, 50 U. S. C. § 783(f). This case is one of first impression in this Circuit, although the Fourth and Seventh Circuits have upheld convictions under the membership clause. *Scales* v. *United States*, 227 F. 2d 581 (4th Cir., 1956) and #7637, October 6, 1958, certiorari granted December 18, 1958; *United States* v. *Lightfoot*, 228 F. 2d 861 (7th Circuit, 1956).*

The evidence presented must be viewed in the light of the trial court's charge to determine the questions raised as to sufficiency and constitutionality. The charge required the jury to make an affirmative finding on four elements before it could convict:

1. The Communist Party is a group which teaches and advocates the overthrow of the United States Government by force and violence as speedily as circumstances will permit;

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* Both these cases were reversed by the Supreme Court (355 U. S. 1 and 2) on the authority of *Jencks* v. *United States*, 353 U. S. 657, following which *Scales* was retried in February 1958 and the conviction again affirmed. Defendant here concedes that there is no *Jencks* question in this case.

2. The defendant was a member of the Communist Party of the United States;

3. While a member defendant had knowledge that the Party taught the forcible overthrow of the Government as soon as circumstances would permit;

4. Defendant individually intended to bring about the overthrow and destruction of the Government by force and violence as soon as circumstances would permit.

In addition, the jury was required to find that these four elements co-existed at some time between September 1, 1951 and November 8, 1954 the period covered by the Statute of Limitations (18 U. S. C. § 3282 as amended September 1, 1954). If the evidence was sufficient to justify the jury's findings on the four elements this will dispose of appellant's challenge to the evidence. We hold that the jury's verdict was supported by the proof on trial.

The nature of the Communist Party as a group which teaches and advocates the overthrow of the Government by force and violence as speedily as circumstances would permit was abundantly established much in the pattern we reviewed and affirmed in *United States* v. *Dennis*, 183 F. 2d 201, affd. 341 U. S. 494 (1951), and *United States* v. *Flynn*, 216 F. 2d 354. Thus, the systematic teaching in Party schools of the principles of Marxism-Leninism together with the so-called Communist "classics" were set forth for the jury. As to the "classics" appellant concedes in his brief that they "all predicted and advocated the eventual overthrow of capitalism by the revolution of the proletariat, to be accomplished by force and violence if necessary." The witness Lautner brought these teachings to the Party schools over a period of many years. That the Party equated the principles of Marxism-Leninism with force and violence was attested to further by its condemnation at the National Convention in 1945 of the "peaceful co-existence" policy of the American Communist Party under the leadership of Browder, described by the Party as a "rejection of the Marxian concept of the revolutionary

initiative of the working class ' and the reconstitution of the Party and reeducation of its members along lines of Marxist orthodoxy. It would serve no useful purpose for us here to review in detail the many documents, books and periodicals before the jury which established and justified a finding that the aims and avowed purposes of the Party was one of dedication to the revolutionary Marxist-Leninist line.

In addition, there was proof of the Party's plan of industrial concentration by which the Party's activities were concentrated in basic industries and the largest plants, and key national figures shifted into the leadership of these concentration districts and areas, thereby attempting to give the Party the power to paralyze the nation's industrial capacity, in furtherance of its ultimate aim. Then, too, there was proof that in 1948 the overt call to forcible overthrow espoused at the Convention was changed because of the Smith Act prosecution of its top leaders, and that consultations were had with European Communist leaders and preparations made based on international experience to take the hard core members of the Party underground, and place them in trade unions and mass organizations. This move was designed to enable the Party—which in time of prosecution suffered a 90% reduction in membership—to function as an organized group under any and all conditions through absolutely loyal members unconditionally dedicated to and particularly suited to carrying out the Party's objectives. There was evidence that as late as Labor Day in 1951, within the indictment period, the defendant as one of those members stated that he was waiting for instructions from his superiors as to what he should do if apprehended, that he might find it necessary to flee the country and that he was willing to endure any hardship and even lay down his life if necessary in order that the work of the Party might continue. When defendant disappeared into the employ of one of the basic industries, in disguise and under a false name, it was reasonable for

the jury to infer that his move had ben dictated by his superiors in the interests of the Party.

The sum of these activities when viewed against the background of the systematic teaching of Marxism-Leninism, the program adopted in 1945, the rigidity of purpose of the Party and the tenacity of the hard core members despite prosecution, and the absence of any evidence of accomplishment or abandonment of their purpose was sufficient basis to support an inference that the character of the Party as a group dedicated to the violent overthrow of the Government, established in prior years, continued unaltered through the statutory period. *United States* v. *Schneiderman*, 106 F. Supp. 892, 899; 2 Wigmore on Evidence § 437, 3rd ed. 1940.*

There is no dispute in this case as to the second element; this is conceded in appellant's brief: "there was no question about Noto's membership in the Communist Party." He was a paid employee and organizer. His income tax return for the year 1951 showed him to be employed as a sub-district organizer and the Party's withholding tax return for the third quarter ending September 31, 1951 and dated October 18, 1951, signed by the defendant as Chairman of the Party showed him to be a paid employee.

The third element, defendant's knowledge of the Party's illegal teaching and advocacy, and the fourth element his intent were also amply supported by proof which justified the jury's finding. Defendant states in his brief, "the Government proved that the defendant was extremely active in the affairs of the Party in Buffalo and Western New York." He was a well indoctrinated member having been taught in Party schools the Marxist-Leninist principles by

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* When the existence of an object, condition, quality or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period. The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end.

use of the Communist "classics." These, as we mentioned above, were the same source materials to which we adverted in the *Dennis* case as proving the prosecution's contention of force and violence "quite independently of the testimony of its witnesses. * * * " 183 F. 2d at 206.

Defendant had occupied positions of importance in the Party; he had been the Greater Buffalo region organizer in 1947, the sub-district organizer of Western New York in 1947-48; Chairman of the Erie County Communist Party and District Chairman of the Party Upstate District. He lectured in these capacities at various meetings on the classical aims and objectives of the Party and apparently considered himself sufficiently well versed in the Party's objectives to predict the time when capitalism would be destroyed and the Government overthrown. In the Fall of 1951 when he was endeavoring to induce Regan, a fellow member, to become active in the Party, he stated that he would stand behind the actions of a particular leader (Ellis) as one who represented Communist Party Policy; that he was familiar enough with the Party's tactics to anticipate that he might be directed to submit to arrest, be bailed out and then jump his bail. In October, 1951 he picked up copies of the Daily Worker at Regan's house; on September 15 or 17th he collected money toward furnishing bail to arrested leaders. Defendant actively participated in the industrial concentration program pointing out the steel industry in his area as the prime Party target. Considering the ultimate Marxist-Leninist goal, concentration on the industry which is probably the most important to the Country's economy suggests the attempt to gain for the Party the ability to sabotage and paralyze the entire nation—a coup vital to the Party's objective to attack when the time was ripe. He assisted the concentration program of getting undercover Communists into key shops and departments within the automobile industry. The jury could well have concluded from these activities that defendant was intent upon the ultimate Marxist-Leninist purpose of forceful overthrow by aiding in the

proximate task of industrial concentration. *Silverman* v. *United States*, 248 F. 2d 671, 685-6 (2nd Cir.).

But it was in the area of the Party's underground apparatus that defendant was particularly active. The witness Lautner was charged by the Party with activating the underground. In this capacity he met with the defendant as one of the three top Party men in the Buffalo area. Defendant was placed in charge of the underground work in all New York State north of Poughkeepsie. Defendant participated in obtaining and secreting machines for printing Party material. He instructed Party subordinates to meet secretly with other Party officials under assumed names. He was awaiting instructions from his superiors and expressed a willingness to follow instructions to leave the Country and even "lay down his life," if necessary, thus emphasizing the unswerving loyalty and devotion exacted of those which made up the elite 10% segment of the underground. Thereafter, he disguised his appearance by growing a mustache and cutting his hair short in order to conceal his identity. He also located homes in which to hide Party members and Party equipment and collected funds to help them. He further cloaked his identity by going to work from 1953 to 1954 in a plant in Newark, N. J. under an alias with a false Social Security number.

While it is true that, apart from the specific instances mentioned, most of the direct evidence of defendant's activities related to a period prior to September, 1951, it provided adequate basis for inferring that his knowledge, intent and responsibility to the Party in carrying out its purposes continued through the following years, since "the running of the statute of limitations cannot empty a man's mind of knowledge of this sort." *Scales* v. *United States*, 227 F. 2d 581, 591; *United States* v. *Mesarosh*, 223 F. 2d 449; *United States* v. *Schneiderman*, 106 F. Supp. 892.

We conclude that the Government proved by sufficient evidence that the defendant was an active member in an organization teaching and advocating the violent overthrow

of the Government well knowing the aim and purpose of the Party and with intent to achieve its illegal purpose.

We turn now to consider the defendant's argument against the constitutionality of the membership clause of the Smith Act. Two arguments are raised: (1) the statute fails to include intent as an element of the offense and (2) it imputes guilt solely by association. Under the first, defendant urges that the prosecution fell into error by "gratuitously adding to the charge" the further charge "and said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit." His argument goes on to assert that the membership clause of the statute "does not require proof of advocacy, teaching or organization by the defendant, or proof of any overt act by the defendant." Since no intent is implicit in membership, defendant says, the statute penalizes membership without proof of personal intent to overthrow the Government by violence, thereby violating the rights of free speech and assembly in the First Amendment as well as due process guaranteed by the Fifth Amendment.

There is no doubt that the membership as well as the advocacy clause limits rights of free speech and assembly guaranteed by the First Amendment. These rights however are not absolute and "were not intended to give immunity for every possible use of language." *Dennis* v. *United States*, 341 U. S. 494, at 534, quoting *Frohwerk* v. *United States*, 249 U. S. 204, 206 (concurring opinion of Mr. Justice Frankfurter). The constitutionality of the infringement must be determined by weighing against it the need for protection to our form of government. In other words, the infringement must be justified by the necessity of this type of protection to the government and this in turn must be decided by the particular activity sought to be punished or forbidden. Does the activity proscribed present an effective means of bringing about or does it create a clear and present danger that the undesirable result—the violent overthrow of the Government—will be brought about?

While we agree that the membership clause does not require proof of advocacy, we do not agree that it does not require proof of intent on the part of the member to bring about the violent overthrow and that it penalizes membership *per se*. Although the statute does not spell out the element of intent, the knowledge of purpose which it does literally require before a conviction may be had is that kind of knowledge from which, if established, it may or must be said that intent inescapably follows. In *Dennis, supra,* the Supreme Court imputed into the Smith Act "as an essential element of the crime proof of intent of those who are charged with its violation to overthrow the Government," and while the charge before it was on the advocacy clause the Court did not limit its examination of the Act and conclusion as to its validity, to that clause but held that:

> "The structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly, those who recruit and combine for the purpose of advocating overthrow intend to bring about overthrow" (p. 499).

That knowing membership in the Communist Party warrants inferences of personal intent and guilt was frankly recognized in Mr. Justice Jackson, in *American Communications Association* v. *Douds,* 339 U. S. 382, 432, when he wrote (concurring and dissenting opinion):

> "Membership in the Communist Party is totally different [from membership in lawful political parties]. The Party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed. They are provided with cards or credentials, usually issued under false names so that the identification can only be made by officers of the

> Party who hold the code. Moreover, each pledges unconditional obedience to party authority. Adherents are known by secret or code names. They constitute 'cells' in the factory, the office, the political society, or the labor union. For any deviation from the party line they are purged and excluded.
>
> "'Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party. Individuals who assume such obligations are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the Party's program.''

An argument similar to that here raised was rejected both by the Fourth and Seventh Circuits in the *Scales* and *Lightfoot* cases, *supra*. The Fourth Circuit equated the act of knowing membership for the purposes of imputing intent with an act of knowingly joining a conspiracy to overthrow the Government and held in the second opinion that on the issue of constitutionality the distinction was without significance:

> "It is too clear for argument that membership in an organization with knowledge of its purposes and intent to make them effective is a joint rather than an individual undertaking which gathers its strength from an association or group of individuals inspired by a common purpose.'' (No. 7637, slip opinion October 6, 1958, p. 7.)

The indictment charged and the jury was required to find intent, as all "membership" cases have so far; this was not under our interpretation of the statute a capricious addition to the charge for requiring criminal intent is the normal course rather than the exception in our jurisprudence. As *Dennis* establishes, Congress could constitutionally make criminal the teaching and advocacy of the violent overthrow of the Government. We think it follows that it could also proscribe high level, active membership unre-

mittingly devoted and pledged to the accomplishment of that end.

The second constitutional argument raised by defendant is that the membership clause imputed guilt solely by association. This argument is a corollary of defendant's further contention that prosecution under the membership clause was barred by Section 4(f) of the Internal Security Act of 1950.* The identical argument was raised and disposed of in *Scales* and *Lightfoot*, *supra*, and we agree with its disposition.

The answer to defendant's contention is, as we have just discussed, that the membership clause does not punish membership *per se*; the additional requirements of knowledge of the criminal purpose of the group and intent to carry out that purpose take this prosecution out of the infirmities which defendant fears. Under this clause of the Act it is not association with tolerance of the activities and aims of the other members which is forbidden, even if it be true that the mere fact of membership gives aid and encouragement to the group, but personal desire and dedication, with full knowledge and awareness, to bring the end to fruition. The guilt must be personal and independent; it may not be vicariously imputed in order to convict under the clause. Moreover, the legislative history of the Internal Security Act shows no evidence that Congress envisioned much less intended a bar to membership prosecutions under the Smith Act. 96 Cong. Rec. 15198, 14190. Indeed Section 4(f) was enacted by Congress to preserve the constitutionality of the registration provisions in the Internal Security Act and Congress expressly stated in Section 17 (50 U. S. C. 796):

> "The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes."

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* That statute provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of subsections (a) or (c) of this section or of any other criminal statute."

As we have said we need not here speculate and attempt to resolve subtle distinctions in the case of one who may innocently have joined the Party for some Utopian idea because this defendant was shown to be a leader steeped in Party discipline and dedicated to its objectives. Clearly this is not a prosecution of membership *per se* but of membership with knowledge and criminal intent.

Defendant complains that the trial court failed to make a finding that a clear and present danger existed of violent overthrow of the Government. This element, as the Supreme Court ruled in *Dennis* is a question for the trial court to determine for itself. 341 U. S. 410. What we said in *United States* v. *Flynn, supra,* disposes of this issue. The factors considered by the trial court and affirmed by us in the latter case were applicable to this case. Indeed, the indictment periods in this case and in *Flynn* were overlapping. During much of the period from September 1951 to November 1954, "The Korean conflict was raging and our relations with the Communist world had moved from cold to hot war * * * " (216 F. 2d 367).

The trial court properly declined defendant's requested charges (1) that the Government failed to prove a clear and present danger of forcible overthrow of the Government and (2) that the jury must find a clear and present danger before it could convict. As both *Dennis* and *Flynn* make explicitly clear this is a question for the court and not the jury. By declining the requested charges and submitting the case to the jury on the four elements we have discussed the trial judge implicitly found the existence of a clear and present danger. We agree that it did exist.

This case does not confront the Court with the prosecution of a leader, organizer or teacher of the Communist Party charged during the indictment period with advocating and teaching the duty and necessity of overthrowing the Government by force and violence or of organizing a society to so advocate. Consequently the incitement to action test enunciated in *Yates* v. *United States,* 354 U. S. 298 and applied by us in *Silverman, supra* and *United States* v.

*Jackson*, 257 F. 2d 830 is inapplicable. The crime for which appellant was indicted, brought to trial and convicted is what determines the sufficiency of the evidence and not another similar, even related, crime. The clauses of the Act are disjunctive and quite separable, and as appellant concedes or maintains there is no requirement that a member or affiliate be shown to have been advocate, teacher or organizer. True it is that this defendant was very likely all three, prior to his going underground, but he was not indicted for pre-underground activities or for teaching and advocating. Proof of these activities was offered and very properly considered by the jury as evidence bearing on his knowledge and intent during the statutory years when he was charged with being a member.

That the words of the statute defining the particular activity proscribed are to be carefully considered and their meaning strictly adhered to was made clear in *Yates*. There the Court went into a careful analysis of the exact meaning of the word "organize" and reversed that part of the indictment which so charged concluding that the activities of the defendant during the statutory period although termed "organizational" corresponded more to the carrying on of an existing body than to the literal meaning of the word—the creating of such body.

> " * * * we find nothing which suggests that the 'organizing' provision was intended to reach beyond this, that is, to embrace the activities of those concerned with carrying on the affairs of an already existing organization. Such activities were already amply covered by other provisions of the Act, such as the 'membership' clause, and the basic prohibition of 'advocacy' in conjunction with the conspiracy provision, and there is thus no need to stretch the 'organizing' provision to fill any gaps in the statute" (308).

Similarly with respect to the words "teach" and "advocate" it found a consciousness on the part of Congress, in

enacting the statute, that these words had been in the past construed as terms of art carrying a special and limited connotation. As defendant points out Congress should not be deemed to have used language which was redundant or mere surplusage and the terms "conspiracy, organization, advocacy, teaching and knowing membership were all specifically, separately and disjunctively enumerated as violations of the Act" (appellant's brief).

The distinction lies in the fact that in the "advocacy" clause it is the act of producing a state of mind in another which is forbidden, *i.e.* a "stirring of people to action" a "call to action" as distinguished from mere "teaching with evil intent." *Yates, supra.* Under the "membership" clause it is the person's own intent to overthrow the Government coupled with activity on his part to achieve the end which is aimed at. Since defendant was not indicted for activities the end result of which were to culminate in action on the part of others, it was not necessary that the evidence of his activities meet the *Yates* test. Upon sufficient proof all four elements of the crime charged in the indictment were submitted under a proper charge to the jury which found the defendant guilty.

The conviction is affirmed.

# APPENDIX B

## Statutes Involved

**1. The Smith Act, 18 U. S. C. 2385:**

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

**2. Section 4(f) of the Internal Security Act, 50 U. S. C. 783(f):**

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the

registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.